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No. 89-939

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

HEALTHAMERICA AND PAMELA MERLE,
Petitioners,
v.
EDWARD MENTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), preempts a state common law claim of fraud against a health care provider for inducing an ERISA plan participant to elect coverage through the provider under an employer-sponsored benefit plan?

2. Whether a state "twisting" statute, which prohibits any legal entity from misrepresenting the benefits of an insurance policy to induce a policyholder to alter his coverage, is a law that "regulates insurance" and thus is saved from preemption under ERISA's insurance saving clause?

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INTERESTS OF THE AMICI [1]

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 616 member life insurance companies, 435 of which hold licenses to conduct insurance business in Alabama. The ACLI's members currently hold 95 percent of the life insurance in force in legal reserve life insurance companies in the United States and 92.6 percent of such insurance in Alabama.

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[1] Counsel for both the Petitioners and the Respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

The Health Insurance Association of America ("HIAA") represents the interests of 320 member companies that write over 85 percent of the health insurance written by commercial insurance companies in the United States and are responsible for 23 percent of the health maintenance organization ("HMO") business in the United States. Approximately 230 HIAA member companies hold licenses in Alabama. The combined memberships of the HIAA and ACLI represent over 90 percent of the health insurance written by insurance companies in the United States.

Although Petitioner HealthAmerica is an HMO and not an insurer, the legal and practical consequences of the decision below—that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), does not preempt an Alabama common law and statutory action for fraud—are matters of grave concern to the members of the ACLI and HIAA. Many members provide group insurance policies to employers who voluntarily establish ERISA-covered employee benefit plans. As with any form of insurance, a predictable allocation of risks and costs, based upon historical patterns of claim payments, is essential to the financial integrity of a finite fund subject to partial liquidation upon the occurrence of events, such as illness or disability. By subjecting multi-state insurers that provide insurance to ERISA plans or undertake ERISA administrative responsibilities to suits under state common laws or statutory fraud laws, in addition to or in lieu of ERISA, the decision below drastically enlarges the exposure of such insurers to the varying standards of conduct that state laws impose; to the varying, and often inconsistent, remedies that those laws permit; and, in particular, to liability for substantial punitive damages awards—a liability that is entirely unpredictable under the many and varying state laws that permit such awards. This result is contrary to the national uniformity of decision that Congress intended to create when

it enacted ERISA. As a result of the unpredictability and lack of uniformity that the decision below creates, members of the ACLI and the HIAA may be unable to offer affordable group insurance policies to the many employers who sponsor insured benefit plans or to undertake administrative responsibilities for ERISA plans.

The ACLI and the HIAA thus have a direct and immediate interest in the issues presented in this case. While the ACLI and the HIAA fully support the Petitioners, they file this brief to provide the Court with their unique perspective on the ERISA issues that this case presents and to offer additional arguments that underscore the importance of this Court's review.

STATUTES INVOLVED

This case involves ERISA § 502, 29 U.S.C. § 1132, and ERISA § 514, 29 U.S.C. § 1144. The relevant portions of these provisions are set forth in the Appendix to this brief, *infra*, at 1a-2a.

STATEMENT

1. The facts essential to the resolution of the issues presented in the Petition are not in dispute.[2] Respondent Edward Menton ("Menton") is entitled to health insurance benefits under an ERISA-covered welfare benefit plan ("Plan") that his employer, the Mobile Press Register ("Press Register"), sponsors (Pet. App. at 1a). To provide the benefits under the Plan prior to 1985, the Press Register purchased a group insurance policy from Connecticut General Life Insurance Company ("Connecticut General") (*id.*). Under this Plan, Connecticut General paid 80 percent of the cost of physical therapy and medical appliances, including crutches, braces and walkers (*id.* at 2a).

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[2] This brief addresses only the ERISA issues in this case. This case also involves an issue with respect to punitive damages, and the amici fully support the arguments of the Petitioners and the amicus, the Alabama Defense Lawyers' Association, on that issue.

In June 1985, the Press Register expanded the coverage options available to its employees under the Plan (Pet. App. at 1a). As alternatives to the existing Connecticut General coverage, the Press Register offered its employees the option to choose medical coverage with either of two HMO's in Mobile, Alabama—Prime Health and Petitioner HealthAmerica (*id.*). To explain the coverage available to employees under these HMO alternatives, the Press Register distributed informational literature to its employees (*id.* at 2a). In addition, prior to the expiration of the enrollment period, representatives of the two HMO's described their programs at an informational meeting with the Press Register's employees (*id.*). Petitioner Pamela Merle ("Merle") represented HealthAmerica at this meeting (*id.*).

Menton attended this informational meeting three days before his son underwent surgery on his legs and, thereafter, began extended post-operative physical therapy (Pet. App. at 2a). At this meeting, the HMO representatives told the Press Register's employees that the HMO coverage was generally equal to, if not better than, the Connecticut General coverage (*id.*). Because Menton could not determine from the program literature whether HealthAmerica would cover his son's physical therapy treatments, however, he asked Merle to explain HealthAmerica's coverage of such expenses (*id.*). Menton asserted that Merle advised him that HealthAmerica would cover 100 percent of his son's medical expenses (*id.* at 3a). In reliance on this alleged conversation, Menton elected to participate in the HealthAmerica program rather than to maintain his coverage with Connecticut General (*id.*).

After enrolling in the HealthAmerica program, Menton received a schedule of benefits from HealthAmerica (Pet. App. at 3a). That schedule indicated that HealthAmerica covered physical therapy benefits at 100 percent, but only for a period of 60 days (*id.*). After confirming with HealthAmerica that the schedule of benefits correctly de-

scribed its coverage, Menton attempted to persuade HealthAmerica to provide unlimited coverage for his son's physical therapy expenses, which amounted to approximately $150 per week, based on the alleged misrepresentation made by HealthAmerica's representative at the informational meeting (*id.*). HealthAmerica declined to do so and paid benefits, at 100 percent, for 60 days (*id.*).

2. On October 28, 1986, Menton sued HealthAmerica and Merle for fraud in Alabama state court (Pet. App. at 3a). He alleged that HealthAmerica made material misrepresentations to him about the benefits available under its program and that he relied on those misrepresentations in dropping his Connecticut General coverage and electing coverage from HealthAmerica (*id.*). He further contended that HealthAmerica "has *denied coverage and refused to pay* for [his son's] physical therapy in the approximate amount of [$2,000] . . . and has additionally *refused to pay* for leg braces and crutches in the amount of approximately [$1,000] . . ." (emphasis added).

3. HealthAmerica moved for summary judgment, and for a directed verdict at the close of Menton's case, on the ground that ERISA preempted Menton's common law fraud action (Pet. App. at 3a). The trial court denied HealthAmerica's motions, concluding that ERISA did not preempt Menton's claim (*id.* at 3a-4a). It further concluded that, in any event, ERISA's insurance saving clause might "save" that fraud claim under Alabama's "twisting" statute, even though Menton had not alleged a violation of that statute (*id.*). The jury then returned a general verdict for Menton in the amount of $2,412.00 for actual damages, plus nearly $1.8 million for punitive damages (*id.* at 24a). After the verdict, Menton amended his complaint, over HealthAmerica's objection, to allege a violation of Alabama's twisting statute (*id.* at 4a).[3]

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[3] Alabama's Trade Practices Law, of which the twisting statute is a part, authorizes the State's insurance commissioner to enforce

4. The Alabama Supreme Court affirmed. It first held that ERISA did not preempt Menton's action because a claim for fraud in the inducement, "where the plaintiff alleges that he relied on misrepresentations made by the defendants in dropping his old hospital insurance and electing coverage under the defendant's plan," does not "relate to" an employee benefit plan (Pet. App. at 4a). In so holding, the court distinguished Menton's "fraud in the inducement" claim, which did not, in the court's view, seek benefits under a plan, from the common law claims at issue in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). It stated that, "[a]lthough the complaint in *Pilot Life* contained a count for 'fraud in the inducement,' the opinion makes it unmistakably clear that the only claims [Dedeaux] pursued were claims seeking damages for improperly processing his claims for benefits under an ERISA-regulated plan" (Pet. App. at 7a). While the court noted that "there is authority on both sides" of this issue, it concluded that "the better reasoned cases, and those which recognize the dual role of state and federal law after ERISA, have reached the conclusion that" ERISA does not preempt such fraud claims (*id.* at 12a-13a). To buttress its conclusion, the court further relied on the analysis made by the authors of a pre-*Pilot Life* law review article to conclude that "[n]either Alabama's fraud statute nor the common law action for fraud purports to regulate, directly or indirectly, the terms and conditions of a plan, and the application of Alabama's fraud law to the facts of this case does not relate to or affect the administration of the plan" (Pet. App. at 15a, citing *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1328-30 (1984)).

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its provisions with appropriate orders. The Eleventh Circuit has held that Alabama's "twisting" statute thus provides no private cause of action. *See Farlow v. Union Central Life Insurance Co.*, 874 F.2d 791 (11th Cir. 1989).

The court next concluded that the trial court correctly allowed Menton to amend his complaint, after the verdict, to allege a violation of Alabama's "twisting" statute (Pet. App. at 16a). It did so because (1) the amendment was redundant and did not prejudice HealthAmerica in that "every element underlying the 'twisting' statute is included in the plaintiff's complaint stating a common law cause of action for fraud" (*id.* at 16a), and (2) in the event that "some other court" decides that ERISA preempts Menton's fraud claim, "then we would hold that a claim under [the twisting statute] could still be maintained under the saving clause of ERISA as a state law regulating the business of insurance" (*id.*). Finally, relying on the Sixth Circuit's decision in *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), the court concluded that ERISA preempts state laws only if it provides a remedy for the alleged wrong and concluded that "Congress has not provided a remedy for the wrong asserted by Mr. Menton . . ." (Pet. App. at 19a).[4]

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[4] Justices Houston and Maddox dissented, concluding that ERISA preempted Menton's fraud claim because the alleged misrepresentation clearly "related to" an employee benefit plan (Pet. App. at 33a). The dissenters further concluded that ERISA did not save Menton's fraud claim under Alabama's "twisting" statute (*id.* at 41a). Relying on the factors that this Court established in *Pilot Life*, they declined to "find that the 'twisting' statute affected a spreading of the risks among policyholders; or that the 'twisting' statute is more integral to the insurer-insured relationship than Alabama's misrepresentation statute, as developed from general principles of tort law; or that the statute in its definition of 'person' and 'insurer' is limited to entities in the insurance business" (*id.*). Finally, they concluded that "ERISA did not deny Menton a remedy" (*id.* at 42a), in that he could have sued under ERISA "to clarify and enforce his rights under the terms of the plan as represented to him, and to obtain equitable relief . . ." (*id.*, citing 29 U.S.C. § 1132(a)).

REASONS FOR GRANTING THE WRIT

I. THE ALABAMA SUPREME COURT'S DECISION THAT ERISA DOES NOT PREEMPT COMMON LAW FRAUD CLAIMS CONFLICTS WITH DECISIONS OF SEVERAL FEDERAL COURTS OF APPEALS AND UNDERMINES THE UNIFORMITY OF ERISA'S ENFORCEMENT SCHEME CONTRARY TO THIS COURT'S DECISION IN *PILOT LIFE*

Congress clearly intended ERISA's "virtually unique pre-emption provision" (*Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983)) to be sweeping in scope—preempting state laws that "relate to" employee benefit plans in substance as well as in form. Once again, this provision raises a critically important issue for this Court's review: whether a state common law action for fraud may be used as a vehicle for avoiding the national uniformity that Congress intended to achieve when it enacted ERISA. The Alabama Supreme Court held that such a state action for fraud survives. Because that conclusion directly conflicts with the decisions of several federal courts of appeals, and threatens to undermine ERISA's exclusive enforcement scheme, this Court should grant review.

ERISA's "deliberately expansive" (*Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 46 (1987)) pre-emption provision, by its plain terms, "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). Giving "[t]he phrase 'relate to' . . . its broad commonsense meaning," this Court has held "that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). This Court has, moreover, "emphasized that the pre-emption clause is not

limited to 'state laws specifically designed to affect employee benefit plans.'" *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 47-48, quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98. To the contrary, ERISA's preemptive reach extends to the indirect effect of state laws because "even indirect state action . . . may encroach upon the area of exclusive federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981).

Despite the expansive breadth of ERISA § 514(a), confusion among the lower courts has prompted this Court on numerous occasions to define the contours of ERISA's "relate to" phrase. Thus, this Court has held that state statutes that apply to, and are specifically designed to affect, employee benefit plans clearly "relate to" such plans within the meaning of ERISA § 514. *See Mackey v. Lanier Collections Agency & Service*, 108 S. Ct. 2182, 2185 (1988) (state anti-garnishment statute); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 739 (state mandated benefits statute). It has held, moreover, that state statutes that do not specifically refer to employee benefit plans, but nonetheless indirectly affect them, likewise "relate to" such plans. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 525 (state statute that prohibited the offsetting of pension benefits with workers compensation benefits); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96-100 (state human rights statute and state disability benefits statute). Significantly, it has also held that generally-applicable common law causes of action, as applied to employee benefit plans, similarly "relate to" such plans under ERISA § 514. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 47-48 (state common law tortious breach of contract, breach of fiduciary duty and fraud in the inducement claims); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 62 (1987) (state common law breach of contract and tortious termination claims).

This Court has not, however, directly addressed ERISA's application to the precise state law claim at issue in this case. Though the common law fraud claim here is fundamentally indistinguishable from the state law claims that this Court addressed in *Pilot Life*, the state and federal courts are in conflict on the question whether state fraud in the inducement claims "relate to" an employee benefit plan under ERISA § 514. The Alabama Supreme Court held below that Menton's fraud claim did not "relate to" an employee benefit plan, in that he purportedly did not seek to recover benefits "under" the Plan. That decision draws support from the Sixth Circuit, which has concluded that ERISA does not preempt a state common law action based on an alleged fraud in inducing participation in an employer-sponsored benefit plan. *See Perry v. P*I*E Nationwide Inc.*, 872 F.2d 157 (6th Cir. 1989).

The decision of the Alabama Supreme Court stands in direct conflict with the decisions of two federal courts of appeals. The Eleventh Circuit has held that ERISA preempts plan participants' fraud claims under Alabama law arising, as here, from their *change of medical benefit coverage* under an ERISA plan in reliance on a provider's misrepresentations, even though the participants had not technically made a claim for benefits "under" the plan. *See Farlow v. Union Central Life Insurance Co.*, 874 F.2d 791 (11th Cir. 1989); *see also Belasco v. W.K.P. Wilson & Sons*, 833 F.2d 277 (11th Cir. 1987). The Ninth Circuit, in a similar context, has reached the same conclusion. *See Davidian v. Southern California Meat Cutters Union*, 859 F.2d 134 (9th Cir. 1988) (ERISA preempts state common law claim of fraud based on an alleged misrepresentation of coverage that induced employee to participate in a new benefit plan).[5]

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[5] Other courts of appeals—including the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits—that have considered whether ERISA preempts a state common law fraud or misrepresentation action in situations involving the *improper denial or processing of benefit*

This conflict among the state and federal appellate courts threatens to undermine ERISA's exclusive remedial scheme. If the decision below stands, other courts, like the Alabama Supreme Court and the Sixth Circuit, will permit participants in ERISA plans to pursue common law fraud actions in state courts that are, in substance, indistinct from a claim for benefits under those plans. Indeed, merely by contending that they do not seek benefits "under" an ERISA plan, but rather seek economic damages amounting to the "added" benefits that induced their alteration of coverage under the plan, these participants can—contrary to this Court's admonition—"avoid[] through form the substance of the preemption provision." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 525. Thus, in some jurisdictions, but not others, these participants can seek state law remedies

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claims have held that it does so. *See, e.g., Hermann Hospital v. MEBA Medical & Benefits Plans*, 845 F.2d 1286 (5th Cir. 1988); *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989); *Reilly v. Blue Cross & Blue Shield United*, 846 F.2d 416, 426 (7th Cir.), *cert. denied*, 109 S. Ct. 145 (1988); *Johnson v. District 2 Marine Engineers Beneficial Ass'n—Associated Maritime Officers, Medical Plan*, 857 F.2d 514 (9th Cir. 1988); *Nevill v. Shell Oil Co.*, 835 F.2d 209 (9th Cir. 1987); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988).

Even after *Pilot Life*, however, the federal district courts remain divided as to whether ERISA preempts common law fraud claims. Most of these courts have, since *Pilot Life*, held that ERISA preempts these claims. *See, e.g., Moffitt v. Blue Cross & Blue Shield, Inc.*, 722 F. Supp. 1391 (N.D. Miss. 1989); *St. Mary Medical Center v. Cristiano*, 724 F. Supp. 732 (C.D. Cal. 1989); *Settles v. Golden Rule Insurance Co.*, 715 F. Supp. 1021 (D. Kan. 1989); *Tucker v. Employers Life Insurance Co.*, 689 F. Supp. 1073 (N.D. Ala. 1988); *Childers v. Northwest Airlines, Inc.*, 688 F. Supp. 1357, 1364 (D. Minn. 1988); *Bohlmann v. Logos School*, 669 F. Supp. 951 (E.D. Mo. 1987). Others have declined to reach this conclusion. *See, e.g., Butler v. Fringe Benefits Plan*, 701 F. Supp. 804 (N.D. Ala. 1988); *Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Pa. 1987).

that ERISA expressly supplanted with its comprehensive civil enforcement scheme rather than seek relief under ERISA § 502 and obtain recovery of benefits or enforce their perceived rights to past or future benefits under the plan.

Menton's recovery of nearly $1.8 million in punitive damages based on a state law fraud complaint, which plainly seeks to recover $3,000 in benefits that he believed HealthAmerica improperly "denied" and "refused to pay," vividly demonstrates this reality. Permitting such a recovery under state fraud law undermines the policy choices that prompted Congress to include certain remedies—and, significantly, to exclude others—under ERISA's comprehensive federal scheme. As this Court concluded in *Pilot Life*, "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." 481 U.S. at 54.

Appropriate protection of the area that Congress has made exclusively federal, and resolution of the conflicts among the state and federal appellate courts, can only be achieved through review by this Court.

II. THE ALABAMA SUPREME COURT'S DECISION THAT ERISA SAVES ALABAMA'S "TWISTING" STATUTE FROM PREEMPTION IS IRRECONCILABLE WITH THIS COURT'S DECISION IN *PILOT LIFE*, CONFLICTS WITH THE REASONING OF SEVERAL COURTS OF APPEALS IN ANALOGOUS CONTEXTS, AND UNDERMINES IMPORTANT POLICIES UNDERLYING ERISA

The decision below that ERISA's insurance saving clause protects Alabama's twisting statute from preemption rests on a misapplication of this Court's decision in *Pilot Life*. It sends a potent signal to disgruntled plan participants that is irreconcilable with the policies

underlying ERISA's preemption provision and its exclusive enforcement scheme: in order to escape ERISA's broad preemption of common law fraud claims, these plan participants need only plead an identical claim under a state insurance fraud statute. Because all states have enacted such statutes in some form (*see* discussion *infra*, at 16-17 and n.8 & n.9), the impact of the decision below on ERISA's exclusive enforcement scheme is far-reaching.

Resolution of this second issue, despite its significance, requires this Court to break no new legal ground. In *Pilot Life*, this Court carefully explained the analytical framework that guides courts in determining whether a state law "regulates insurance" (29 U.S.C. § 1144(b)) so that it is saved from preemption under ERISA's insurance saving clause. This Court first held that, under "a 'common-sense view' of the language of the saving clause itself" (481 U.S. at 48), a law cannot "regulate insurance" unless it is "specifically directed toward that industry." *Id.* at 50. It then held that courts must look to the three criteria that define the "business of insurance" under the McCarran-Ferguson Act to determine whether a state law falls within ERISA's insurance saving clause: "'*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.'" *Id.* at 48-49, quoting *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982) (emphasis in original). Applying these standards in *Pilot Life*, the Court concluded that ERISA did not preserve Mississippi's law of "bad faith" because neither a "common sense" view of the saving clause nor the "business of insurance" criteria supported the conclusion that the law "regulate[d] insurance." 481 U.S. at 50-51.

The court below plainly misapplied this Court's decision in *Pilot Life*. Addressing only the first prong of this

Court's test, the Alabama Supreme Court held that the saving clause "saves" the twisting statute from preemption because the statute "specifically relates to the insurance industry" (Pet. App. at 18a). It did so even though it recognized that the elements of a twisting statute violation are precisely the same elements that support the generally-applicable theory of common law fraud (*id.* at 16a) and even though the twisting statute, by its terms, applies to all legal entities—including, but not limited to, individuals, insurers and corporations (*see* Ala. Code § 27-1-2(3)).[6] The court below did not, moreover, even attempt to apply the three "business of insurance" criteria to the twisting statute. It did not explain how the twisting statute transfers or spreads a policyholder's risk—which, as the dissent properly concluded, the law does not do (Pet. App. at 41a). It did not explain how, if at all, the law affects an integral part of the insurer-insured relationship. And it did not address the fact that the law applies not just to insurers, but to entities outside the insurance industry as well (*see* Ala. Code § 27-1-2 (3)). Having ignored these criteria, the court below reached the anomalous conclusion that, even if ERISA preempts claims of common law fraud, it "saves" precisely the same claims as "insurance regulation" under the state insurance statute.[7]

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[6] The twisting statute provides that no "person" shall misrepresent or make misleading comparisons about the terms, conditions, or benefits of an insurance policy "for the purpose of inducing, or attempting or tending to induce, the policyholder to lapse, forfeit, surrender, retain, exchange or convert any insurance policy." Ala. Code § 27-12-6. The statute defines "person" to mean "[a]n individual, insurer, company, association, organization, Lloyd's insurer, society, reciprocal insurer or interinsurance exchange, partnership, syndicate, business trust, corporation and every legal entity." *Id.*, § 27-1-2(3).

[7] In so concluding, the court below stated that a contrary decision would mean that Alabama's insurance commissioner "would be preempted from imposing the statutory sanctions against insur-

The federal courts of appeals, in related contexts, have declined to employ ERISA's saving clause to effectuate such a "form-over-substance" evasion of its preemption provision. In *Kanne v. Connecticut General Life Insurance Co.*, 859 F.2d 96, 99-100 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3216 (1989), for example, the Ninth Circuit considered a plan participant's claim that an insurer had improperly processed a benefit claim in violation of a state unfair insurance practices statute. The Ninth Circuit, however, declined to hold that ERISA's insurance saving clause "saved" the statutory claim. It based this conclusion on the fact that (i) the participant's statutory claim was virtually the same as his common law "bad faith" claim and (ii) this Court made clear in *Pilot Life* that ERISA is the exclusive vehicle for challenging actions asserting the improper processing of benefit claims. *Id.* at 100. The Fifth, Eighth and Eleventh Circuits have likewise refused to sanction similar efforts to evade ERISA preemption of claims under state insurance statutes through an overly-expansive reading of the saving clause. *See Ramirez v. Inter-Continental Hotels*, 890 F.2d 760 (5th Cir. 1989) (state insurance and trade practices statute not saved from preemption as law regulating insurance); *In re Life Insurance Co. of North America*, 857 F.2d 1190, 1193-95 (8th Cir. 1988) (state vexatious refusal to pay insurance benefits statute not saved from preemption as law regulating insurance); *Anschultz v. Connecticut General Life Insurance Co.*, 850 F.2d 1467, 1468-69 (11th Cir. 1988) (state insurance practices statute not saved from preemption as law regulating insurance).

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ance companies that violate § 27-12-1 et seq." (Pet. App. at 18a). This statement is unwarranted. ERISA preempts state laws only "*insofar* as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). To the extent that Alabama's insurance commissioner seeks to enforce the twisting statute in contexts not involving any employee benefit plan, nothing in ERISA precludes him from doing so.

In sharp contrast with the well-reasoned decisions of these courts of appeals, the Alabama Supreme Court has endorsed precisely such a back-door evasion of ERISA's exclusive enforcement scheme that will have serious effects on ERISA plans nationwide. Fourteen other states have included "twisting" provisions in their insurance codes that are identical or similar to the Alabama statute at issue in this case.[8] All other states have enacted similar "misrepresentation" provisions as part of their unfair trade practices statutes or insurance codes.[9] To the

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[8] *See* Alaska Stat. § 21.36.050 (1989); Cal. Ins. Code § 781 (West 1972); Del. Code Ann. tit. 18, § 2304(20) (1975); Fla. Stat. Ann. § 626.9541(1) (West 1984); Idaho Code § 41-1305 (1977); Ky. Rev. Stat. Ann. § 304.12-030 (Michie 1988); Me. Rev. Stat. Ann., tit. 24-A, § 2155 (1974); Md. Ann. Code Art. 48A, § 227 (1986); Mont. Code Ann. § 33-18-204 (1989); Nev. Rev. Stat. Ann. § 686A.050 (Michie 1986); N.M. Stat. Ann. § 59A-16-6 (Supp. 1988); S.D. Codified Laws Ann. § 58-33-8 (1978); Wash. Rev. Code Ann. § 48.30.180 (1984); Wyo. Stat. Ann. § 26-13-105 (1977).

[9] *See* Ariz. Rev. Stat. Ann. § 20-443(5) (Supp. 1989); Ark. Code Ann. §§ 23-66-206(1)(F), 23-66-306(a) (1987 & Supp. 1989); Colo. Rev. Stat. § 10-3-1104(1)(a)(VI) (1987); Conn. Gen. Stat. Ann. § 38-61(1)(f) (West 1988); D.C. Code Ann. § 35-519 (1988); Ga. Code Ann. § 33-6-4(b)(2) (Supp. 1989); Haw. Rev. Stat. § 431-643(1)(F) (1985); Ill. Ann. Stat. ch. 73, para. 761 § 149(2) (Smith-Hurd Supp. 1989); Ind. Code Ann. § 27-4-1-4(1)(E) (West Supp. 1989); Iowa Code Ann. § 507B.4(1)(f) (West 1988); Kan. Stat. Ann. § 40-2404(1)(f) (1986); La. Rev. Stat. Ann. § 22:1214(1) (West 1978); Mass. Gen. Laws Ann. ch. 176D § 3(1)(f) (West 1987); Mich. Comp. Laws Ann. § 500.2005(f) (West 1983); Minn. Stat. Ann. § 72A.20(1) (West 1986); Miss. Code Ann. § 83-5-35(a) (1973); Mo. Ann. Stat. § 375.936(6)(f) (Vernon Supp. 1989); Neb. Rev. Stat. § 44-1525(1)(f) (Supp. 1989); N.H. Rev. Stat. Ann. § 417:4(I) (1983); N.J. Stat. Ann. § 17:29B-4(1) (West 1985); N.Y. Ins. Law §§ 2123, 2402-03 (McKinney 1985 & Supp. 1990); N.C. Gen. Stat. § 58-54.4(1) (1982); N.D. Cent. Code § 26.1-04-03(1) (1989); Ohio Rev. Code Ann. § 3901.21(A) (Anderson 1989); Okla. Stat. Ann. tit. 36, § 1204(1) (West Supp. 1990); Or. Rev. Stat. Ann. § 746.075(1) (Butterworth 1989); Pa. Stat. Ann. tit. 40, § 278 (Purdon 1971); R.I. Gen. Laws § 27-29.4(1) (1989); S.C. Code Ann. § 38-57-60

extent that these statutes authorize private actions, the decision below encourages ERISA plan participants in these states to pursue, in substance, preempted common law fraud claims in the form of purported violations of the "twisting" or "misrepresentation" provisions of state insurance codes. It thus allows participants to employ artful pleading tactics, as Menton did here, to ensure that state courts will decide their disguised claims for ERISA plan benefits and will award them state law remedies, including massive punitive damages awards like the aggregate $1.8 million award in this case.

This result is wholly at odds with the intention of Congress that ERISA's civil enforcement provisions shall be the exclusive vehicle for actions that—regardless of their title or form—seek benefits under an employee benefit plan. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 51-56; *see generally* Note, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 Vand. L. Rev. 607, 632 n.154 (1989). The decision below thus spawns precisely the type of disuniformity of decisions, under many and varying state laws, that Congress sought to avoid in ERISA.

(Law. Co-op. 1989); Tenn. Code Ann. § 56-8-104(1)(F) (1989); Tex. Rev. Civ. Stat. Ann. art. 21.21 § 4(1) (Vernon 1981); Utah Code Ann. § 31A-23-302(1)(a)(i) (Supp. 1989); Vt. Stat. Ann. tit. 8, § 4724(1)(F) (1984); Va. Code Ann. § 38.2-502(6) (1986); W. Va. Code § 33-11-4(1)(f) (1988); Wis. Stat. Ann. § 628.34(2) (West 1980).

CONCLUSION

The recent observation of the Second Circuit in *General Electric Co. v. New York State Department of Labor*, 1989 U.S. App. LEXIS 18243 (2d Cir. Nov. 29, 1989), is highly pertinent here. It said that the problem with courts "adjudicating in the same area but reaching inconsistent results . . . is exactly what ERISA was designed to prevent." Only this Court can restore "[t]he uniformity of decision which [ERISA] is designed to foster." H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973).

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

FEDERAL STATUTORY PROVISIONS

1. ERISA § 502(a), 29 U.S.C. § 1132(a), provides that:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 [the fiduciary provisions] of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . .

2. ERISA § 514(a), 29 U.S.C. § 1144(a), provides that:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

3. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), the so-called "insurance saving clause," provides that:

> Except as provided in paragraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.